No. 42661-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Channing Davis,

Appellant.

Clallam County Superior Court Cause No. 11-1-00219-4

The Honorable Judge George Wood

Appellant's Reply Brief

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I. PROSECUTORIAL MISCONDUCT REQUIRES REVERSAL.

In this case, the prosecutor's closing arguments were peppered with the word "I." RP (9/13/11) 54-64, 83-89. The cumulative effect was to make clear to jurors that he was arguing his own personal belief. This was misconduct.[1] *State v. Reed,* 102 Wash.2d 140, 684 P.2d 699 (1984); *State v. Monday*, 171 Wash.2d 667, 677, 257 P.3d 551 (2011).

Respondent erroneously attempts to characterize the prosecutor's misconduct as "poor argument style" and suggests that "counting the pronoun 'I' misses the point." Brief of Respondent, p. 13. Instead, Respondent argues, each use of 'I' should be analyzed individually. Brief of Respondent, pp. 11-12.

Respondent's argument would carry greater weight if the prosecutor's 'poor argument style' didn't pervade the state's entire closing argument. A few scattered uses of the pronoun might not rise to the level of misconduct, but when the prosecutor's argument is filled with the

[1] The misconduct created a manifest error affecting Mr. Davis's right to due process and his right to a jury trial, and thus may be addressed for the first time on appeal. RAP 2.5(a)(3); *Turner v. Louisiana*, 379 U.S. 466, 472, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965); *Sheppard v. Maxwell*, 384 U.S. 333, 335, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966). In the alternative, the prosecutor's argument was so flagrant and ill-intentioned that the error may be raised for the first time on review. *State v. Walker*, 164 Wash.App. 724, 730, 265 P.3d 191 (2011).

personal pronoun, it is impossible to escape the conclusion that the argument as a whole is a statement of personal belief, regardless of how each individual instance can be parsed.

Nor can the court's general instruction—that the lawyer's arguments are not evidence—cure the error. The problem is not that jurors might mistake the prosecutor's arguments for evidence; the problem is that misconduct of this sort throws the prestige of the prosecutor's public office and the attorney's personal belief of the accused person's guilt onto the scales, in addition to the evidence actually presented at trial. *Monday, at* 677.

Respondent has made no effort to argue that any error was harmless.[2] Brief of Respondent, pp. 10-13. Accordingly, Mr. Davis's conviction must be reversed and the case remanded for a new trial. *Id.*

II. MR. DAVIS WAS UNLAWFULLY RESTRAINED DURING HIS JURY TRIAL, AND RESPONDENT HASN'T SHOWN BEYOND A REASONABLE DOUBT THAT THE ERROR WAS HARMLESS.

Mr. Davis attended his own trial wearing a leg restraint. RP (9/12/11) 5-6. The court did not hear evidence or make findings regarding

[2] Instead, Respondent argues that any error was not flagrant and ill-intentioned, and thus should not even be reviewed. Brief of Respondent, pp. 13-14. This is incorrect. First, the misconduct manifestly affected Mr. Davis's right to due process and to a jury trial, and thus is reviewable under RAP 2.5(a)(3). Second, the proscription against offering a personal opinion in closing argument is so well-settled and long-standing that counsel's violation of the rule cannot be anything other than flagrant and ill-intentioned.

the need for restraint, and the judge took no steps to conceal the restraint (other than warning Mr. Davis not to walk in front of jurors). *See* RP *generally*.

The unnecessary imposition of restraints violated Mr. Davis's right to due process. *State v. Damon,* 144 Wash.2d 686, 691, 25 P.3d 418 (2001); *State v. Finch*, 137 Wash.2d 792, 844, 975 P.2d 967 (1999). The error is presumed to be prejudicial. *See, e.g., State v. Jaquez*, 105 Wash. App. 699, 710, 20 P.3d 1035 (2001).

Respondent concedes that restraints were imposed without the required hearing and findings. Brief of Respondent, p. 15. Respondent seeks to rebut the presumption of prejudice by arguing that the burden rests with Mr. Davis to show that jurors saw the restraints. Brief of Respondent, pp. 15-16 (citing *State v. Hutchinson,* 135 Wash.2d 863, 959 P.2d 1061 (1998), cert. denied 525 U.S. 1157, 119 S. Ct. 1065, 143 L. Ed. 2d 69 (1999)). But *Hutchinson* is inapposite: in that case, the lower court held a hearing on the need for shackling, and the judge made a record that jurors would not be able to see the restraints.

Instead, shackling is inherently prejudicial, and the burden is on the state to prove beyond a reasonable doubt that any error was harmless:

> [W]hen no reasons are given by the trial court, and it is not apparent that shackling is justified, the defendant need not demonstrate actual prejudice on appeal to make out a due process

> violation; rather, the burden is on the government to prove beyond a reasonable doubt that the shackling error complained of did not contribute to the verdict obtained.' If the government cannot bear its burden, the conviction must be vacated and the case remanded for a new trial.

United States v. Banegas, 600 F.3d 342, 345-46 (5th Cir. 2010) (footnotes omitted) (quoting *Deck v. Missouri*, 544 U.S. 622, 635, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005)). In order to meet this burden, the government must prove beyond a reasonable doubt that the restraints could not be seen by the jury. *Banegas, at* 347.

Respondent cannot show beyond a reasonable doubt that the restraints were invisible to jurors and that the shackling error did not contribute to the verdict. Respondent attempts to overcome this problem by making bare assertions, unsupported by the record, about the restraints used and the arrangement of the courtroom.[3] Brief of Respondent, pp. 17-18.

In fact, nothing in the record shows that the restraints were invisible to jurors during the trial. *See* RP, *generally*. Furthermore, other than one conclusory statement, Respondent fails to address Mr. Davis's

[3] Without citation to the record, Respondent asserts that Mr. Davis "wore an unobtrusive leg band under his clothes [and] sat at the counsel table with his attorney." Brief of Respondent p. 17. Respondent also asserts—again without citation to the record—that "[a] witness's legs are hidden while in the witness chair." Brief of Respondent, p. 17 n. 5. Nor does Respondent provide a citation for the assertion that Mr. Davis "had a hidden restraint that was not visible..." Brief of Respondent, pp. 17-18.

argument that the improper use of restraints interfere with an accused person's ability to testify and to assist in the defense, and that the unnecessary use of restraints offends the dignity of the judicial process. Brief of Respondent, pp. 15-18. These are all core concerns articulated by the *Finch* court. *Finch, at* 845.

The improper use of restraints is presumed prejudicial. *Jaquez, supra; Banegas, supra.* Respondent does not show that the error was harmless beyond a reasonable doubt. Accordingly, the conviction must be reversed and the case remanded for a new trial, with instructions to allow Mr. Davis to appear in court without restraints. *Id.*

III. THE PROSECUTION DID NOT PROVE THAT EKEGREN SUFFERED SUBSTANTIAL BODILY HARM.

The prosecution did not prove substantial bodily harm at trial. The state did not present testimony from Ekegren; nor did it introduce any evidence establishing the duration of his injuries. In fact, nothing in the record established how Ekegren appeared and felt on the day after the conflict occurred. RP (9/12/11) 36-90, 102-103; Exhibit 14. The evidence was therefore insufficient to establish that Ekegren suffered "a temporary but substantial disfigurement [or] a temporary but substantial loss or impairment of the function of any bodily part or organ [or] a fracture of any bodily part." RCW 9A.04.110(4)(b); CP 20.

Respondent's assertion that the evidence "shows a serious and severe beating" does nothing to address the gap in the state's proof: no evidence was introduced showing how Ekegren appeared even one day after the incident. *See* Brief of Respondent, p. 21. Without some evidence that the injuries persisted, the evidence was insufficient.

Mr. Davis's conviction must be reversed and the case dismissed with prejudice. *Smalis v. Pennsylvania,* 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

IV. RESPONDENT'S CROSS APPEAL: THE TRIAL JUDGE ACTED WITHIN HIS DISCRETION WHEN HE REFUSED TO DEFINE THE TERM "DISFIGUREMENT."

A. Standard of Review

The wording of jury instructions is a matter within the trial court's discretion. *State v. O'Donnell*, 142 Wash. App. 314, 324, 174 P.3d 1205 (2007). Whether the words used in an instruction require further definition is also a matter of discretion. *Id, at* 325. A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Flores-Martinez*, ___ Wash.App. ___, ___, ___ P.3d ___ (2012).

B. The trial judge did not abuse his discretion.

Judge Wood had discretion to reject the state's proposed instruction defining "disfigurement." *O'Donnell, at* 324. He exercised that discretion by rejecting the proposed instruction. This decision cannot be described as "manifestly unreasonable." *Flores-Martinez, at* ___. He should be free to make the same decision if the case is returned to superior court for a new trial. *Id.*

CONCLUSION

Mr. Davis's case must be dismissed with prejudice. In the alternative, the charge must be remanded for a new trial.

Respectfully submitted on May 18, 2012,

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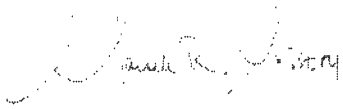

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 18, 2012.

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BACKLUND & MISTRY

May 18, 2012 - 11:33 AM

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